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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. _____.

THE AMERICAN CRAYON COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The American Crayon Company ("American Crayon") prays that a writ of certiorari issue to review that part of the judgment of the Court of Appeals for the Sixth Circuit entered on April 20, 1955, which affirmed and enforced portions of the Commission order involved in this case.

OPINION BELOW.

The Court of Appeals did not render any opinion. Its judgment is reported at 223 F. 2d 264.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 20, 1955, and a petition for rehearing was denied May 16, 1955. An order extending to and including September 17, 1955, the time to file a petition for a writ of certiorari was entered on July 20, 1955, and by order entered September 6, 1955, the time for filing was further

extended to and including October 13, 1955, provided the time had not already expired.

On September 12, 1955, the Solicitor General, on behalf of the Federal Trade Commission, filed a petition for a writ of certiorari to review a part of the judgment of the lower court in this case. This petition of American Crayon, which is in effect a petition for a cross-writ of certiorari, prays for a review of the remaining part of that judgment.[1]

In response to the Solicitor General's petition, American Crayon has filed a statement waiving the right to file a brief in opposition. In its statement American Crayon offers to join in the suggestion of the Solicitor General that his petition be granted and that this Court, without further briefs or oral argument, reverse that part of the judgment of the lower court of which he has sought review and remand the case for further proceedings.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

The question presented is whether a court of appeals may affirm and enforce parts of a Commission order, which it has not found to be valid, solely because violations thereof have been shown.

A subsidiary question is whether the provision in Section 11 of the Clayton Act that the "findings of the Commission" as to the facts, "if supported by substantial evidence, shall be conclusive" is applicable to findings made in an investigation proceeding initiated by the Commission to determine whether its order has been violated.

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[1] The Solicitor General has filed copies of the record in connection with his petition. Reference is made to that record herein, as contemplated by Rule 21, paragraph 5, in the case of a cross-writ of certiorari.

STATUTES INVOLVED.

The pertinent sections of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U. S. C. 12, et seq., commonly known as the Clayton Act, are printed at pp. 3-4 of the Solicitor General's petition.

STATEMENT.

The cease and desist order involved in this case, issued by the Commission in 1940, consists of six paragraphs, the first three relating to Section 2(a), and the other three relating to Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.

No judicial review was sought until 1953, when the Commission petitioned the court of appeals to affirm and enforce the order. It alleged that the order was validly issued and prayed for a decree of affirmance. It further alleged that American Crayon had violated the Section 2(d) part thereof, and prayed for a decree of enforcement of the order in its entirety. In support of the latter contention the Commission filed with its petition a transcript of investigation proceedings which it had conducted in 1951 and 1952, the transcript including a "report" in which the Commission found that part 2(d) of the order had been violated. By timely answer, American Crayon challenged the Commission's right either to affirmance or to enforcement of any part of the order, and asked that it be set aside in its entirety. The answer put in issue the validity of the order, as to each portion of it, as well as the sufficiency of the Commission's evidence of alleged violation of the 2(d) portion of the order.

On April 20, 1955, the court of appeals without opinon entered a judgment (App. 15-16) affirming and enforcing paragraphs 4-6 of the cease and desist order, and setting

aside paragraphs 1-3. The judgment, after reciting that paragraphs 1-3 relate to Section 2(a), and paragraphs 4-6 relate to Section 2(d), that the Commission had found that its investigation "did not disclose substantial violations" of the former but that the evidence did show "serious and substantial violations" of the latter, and that "the findings of the Commission are supported by substantial evidence upon the record considered as a whole," concluded:

> "IT IS ORDERED that the order to cease and desist issued December 31, 1940, be and it is hereby modified by striking therefrom paragraphs 1, 2, and 3. Cf. *Federal Trade Commission v. Standard Brands, Inc.*, 189 Fed. (2d) 510, 515 (C. A. 2);
>
> "IT IS ORDERED that as so modified the order of the Federal Trade Commission is affirmed and enforced."

The Commission filed a petition for rehearing in which it argued, among other things, that affirmance of a Commission order, as distinguished from enforcement, "depends solely on validity," not upon violation. American Crayon obtained an extension of time to file a petition for rehearing, but before that time had elapsed, the court denied the Commission's petition without opinion.

REASONS FOR GRANTING THE WRIT.

As stated in response to the Solicitor General's petition in this case, the fundamental problem is identical for both parties. It was most accurately expressed in his statement (p. 8) of the argument advanced by the Commission in its petition for rehearing:

> "Affirmance of a Commission order, as distinguished from enforcement, 'depends solely on validity,' not upon violation."

The court of appeals took the opposite view, ruling that affirmance depends solely on proof of violation, not upon validity. As a result, the court set aside the 2(a) part of the order not because it found those provisions were invalid, but solely because the Commission had not shown that they had been violated. On the same premise, the court affirmed and enforced the 2(d) part of the order, not because it found those provisions were valid, but solely because the Commission had shown that they had been violated. The Commission is aggrieved by the application of the court's reasoning as to Section 2(a); and American Crayon in respect of Section 2(d).

The Solicitor General has pointed out (pp. 10-11) that the rule of the court of appeals (as here applied to 2(a)) would seriously handicap the Commission, in that its orders would be set aside upon review, without regard to validity, if the commission could not show that they had been violated. Likewise, the rule (as here applied to 2(d)) would seriously impair the right of any one to court review of an order issued against him, in that the order would be affirmed upon court review, without regard to validity, if the Commission was able to show he had violated it.[2]

As the Solicitor General explains in his petition (pp. 9-10), former Commission practice involved two steps. The Commission sought affirmance of its order as the first step. If the court of appeals decided that the findings of the Commission were supported by substantial evidence,

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[2] This consequence would be especially unwarranted in circumstances such as are involved in this case. Here American Crayon contends, among other defenses, that the 2(d) part of the order is invalid because it provided no tangible standards by which compliance can be measured. This is one of the issues which was raised by American Crayon in the court of appeals and which remains to be determined upon remand.

that the findings were sufficient to warrant an order, and that the order as issued was valid, the court entered its decree of affirmance; otherwise the court modified it or set it aside. In brief, the Commission's first burden was to show that the order was valid, in order to obtain affirmance. *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470; *Federal Trade Commission v. Standard Brands, Inc.*, 189 F. 2d 510 (C. A. 2).

If the order was affirmed, the next step was to determine whether the Commission was entitled to a decree of enforcement. As the above authorities show, in order to obtain enforcement, the Commission must show not only that the order is valid, but must also prove violation of it subsequent to issuance. At this juncture, the court might have appointed the Commission as special master to conduct an investigation to determine the question of violation. An order of enforcement would then be entered as to any part of the order as to which violations were shown.[3]

Such separate steps preserved the distinction between affirmance—which depends on validity of the order, and enforcement—which depends on compliance with an order found by the court to be valid. This distinction has been erased in this case, presumably because of the attempt of the Commission to combine affirmance and enforcement

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[3] In his petition the Solicitor General argues (p. 10) that the court of appeals should enforce all parts of an order if violation of any part is shown. He does not, however, cite any authority in support of his position. Holding to the contrary is *Federal Trade Commission v. Standard Brands, supra.* The order against *Standard Brands* was spelled out in four paragraphs, each of which pertained to Section 2(a). The Commission claimed that paragraphs (2), (3) and (4) of its order had been violated, and asked the court, if it affirmed the order, to enforce those paragraphs. The court determined that paragraph (2) had not been violated and denied enforcement of it.

in one proceeding, with adverse consequences to both parties.

The confusion created by the telescoping of affirmance and enforcement extends to the weight given by the court of appeals to the Commission's "report" on alleged violations of part 2(d) of the order. The question of violation is for the court, not the Commission, to determine.[4] The provision in Section 11 of the Clayton Act that the findings of the Commission as to the facts shall be conclusive if supported by substantial evidence, relates only to findings made in the initial Commission proceeding on which its order is to be based. It obviously does not relate to findings in an investigation proceeding conducted by the Commission after the entry of its order, which proceeding is not even provided for by the statute.

CONCLUSION.

The Solicitor General has suggested that the Court may deem it appropriate to grant certiorari, and reverse, without further briefs or oral argument, the portion of the judgment of the court below which struck paragraphs 1, 2 and 3 of the Commission's order, and accordingly, remand the case for further proceedings.

American Crayon has offered to join in that request.

American Crayon, in turn, suggests that the Court may deem it appropriate to grant certiorari, and without further briefs or oral argument, reverse the judgment of

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[4] Nevertheless, in this case the court below enforced paragraphs 4-6 of the order solely because the Commission had found violation of them, and because the court considered itself bound by the Commission's finding. The judgment itself so indicates. It recites that the Commission had found violation, not that the court had done so; if the court had found violation, it would have so stated.

the court below in its entirety, and accordingly, remand the case for further proceedings.

Respectfully submitted,

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Attorney for The American Crayon Company, Petitioner.

RICHARD R. KRUSE,
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Of Counsel.

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CITATIONS

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Act of October 15, 1914, 38 Stat. 730, as amended, 15 U. S. C. 12, et seq.

Section 2(a)	3
Section 2(d)	3
Section 11	4

Miscellaneous:

Stern and Gressman, *Supreme Court Practice*, 2d ed. (1954), p. 166	2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 454

THE AMERICAN CRAYON COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The court of appeals did not write an opinion. Its judgment is reported in 223 F. 2d 264.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1955, and a timely petition for rehearing, filed by the Federal Trade Commission, was denied on May 16, 1955. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Burton, on July 20, 1955, to September 15, 1955, and was further extended by Mr. Justice Burton, on September 6, 1955, to October 13, 1955. The

petition for a writ of certiorari was filed on October 10, 1955.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The Federal Trade Commission, after hearing, found that one of two parts of an outstanding cease-and-desist order had been violated. Upon the Commission's petition to affirm and enforce the entire order, the court of appeals affirmed and enforced the part that had been violated, but set aside the other part on the ground that it had not been violated.

The question presented is whether the court of appeals affirmed and enforced the part of the order that had been violated solely because of such violation, without having considered and upheld its validity.

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[1] We note that there may be some question as to the timeliness of the petition. The Commission's petition for rehearing, filed in the court of appeals, was addressed solely to that court's action in setting aside paragraphs 1-3 of the Commission's cease-and-desist order. No petition for rehearing was filed by American Crayon. The instant petition challenges the court of appeals' action in affirming and enforcing paragraphs 4-6 of the cease-and-desist order. Unless the Commission's petition for rehearing tolled American Crayon's time for seeking review in this Court of the portions of the judgment relating to paragraphs 4-6 (see, generally, Stern and Gressman, *Supreme Court Practice*, 2d ed. (1954), p. 166, and cases there cited), the instant petition cannot be entertained. Petitioner's first application for an extension of time was filed in this Court 91 days after entry of judgment by the court of appeals, and the total expired time between entry of judgment and the filing of the petition was 173 days. We also note that Mr. Justice Burton's two orders granting extensions contained the words, "provided the time has not already expired."

STATUTE INVOLVED

The pertinent provisions of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U. S. C. 12, *et seq.*, commonly known as the Clayton Act, are as follows:

> SEC. 2. (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such comodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.
>
> * * * * *
>
> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or

in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

SEC. 11. * * * If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of

the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

STATEMENT

This case involves the same order of the Federal Trade Commission which is before this Court on the Commission's petition for certiorari in No. 389, this Term, and we respectfully refer the Court to pages 5 to 8 of that petition, where the facts are set forth. In brief, they are that in 1940 the Commission issued a cease-and-desist order prohibiting petitioner from engaging in certain selling practices found to violate Sections 2(a) and 2(d) of the Clayton Act; that no judicial review was then sought of that order; that in 1953 the Commission, after an adversary hearing, found that petitioner had violated, and was continuing to violate, the 2(d) provisions of the order, but not the 2(a) provisions; and that the Commission then petitioned the court of appeals to affirm and enforce the entire order. In its answer, petitioner denied that any part of the order was valid, or that it had violated the 2(d) provisions, and it urged the court to set aside the entire order. The court, without opinion, entered a judgment which, after reciting that the Commission had found that the 2(d) provisions but not the 2(a) provisions had been violated and that the Commission's findings were supported by substantial evidence, affirmed and enforced the 2(d) provisions of the order, but set aside the 2(a) provisions. In No. 389, the Government is seeking review of the portion of the judgment which set

aside the 2(d) provisions; petitioner here seeks review of that portion of the judgment which affirmed and enforced the 2(a) provisions.

ARGUMENT

Petitioner concedes that the court of appeals set aside the 2(a) provisions of the order (pars. 1-3) "not because it found those provisions were invalid, but solely because the Commission had not shown that they had been violated" (Pet. No. 454, p. 5; cf. Pet. No. 389, pp. 8, 12-13), and it does not oppose the Government's request for summary reversal in No. 389 (Memorandum of American Crayon Company, No. 389, p. 1; Pet. No. 454, pp. 2-7). Petitioner argues (Pet. No. 454, p. 5), however, that by the same reasoning the court of appeals affirmed and enforced the 2(d) provisions of the order (pars. 4-6) "not because it found those provisions were valid, but solely because the Commission had shown that they had been violated." It accordingly urges that the Court should also grant certiorari in this case and should reverse summarily the entire judgment below.

This contention ignores the significant difference between the statutory requirements for affirmance and for enforcement. As pointed out in the petition in No. 389 (pp. 9-10), the Commission is entitled to simple affirmance merely upon a showing of validity. But enforcement requires both that the order be valid (since only a valid order can be enforced) and that it shall have been violated. We submit that in affirming and enforcing the 2(d)

provisions of the order the court of appeals necessarily passed upon and upheld their validity.

The Commission requested the court of appeals to affirm and enforce the entire order, and petitioner's answer, insofar as it related to the 2(d) provisions, challenged both their validity and the Commission's finding of violation (Pet. No. 454, p. 3). Thus, there was no occasion to reach the enforcement issue unless the court was satisfied that the order (which rested, incidentally, upon stipulated facts) was valid. That the court not only meant to determine but actually determined that the 2(d) provisions were valid is shown by the fact that the dispositive portion of its judgment states *"affirmed and enforced"*.

The fact that the court's judgment recites that the 2(d) provisions but not the 2(a) provisions had been violated, but does not also in terms recite that the 2(d) provisions are valid, does not show, as petitioner implicitly assumes, that the court must have given effect to the 2(d) provisions solely because they had been violated. For, as we pointed out in our petition in No. 389 (pp. 12-13), and as petitioner concedes (see *supra,* p. 6), the court set aside the 2(a) provisions solely because of its erroneous view that failure to show violation of a valid order justified setting it aside. The question of violation is material only in determining whether to enforce an order; it does not arise in determining whether affirmance is required, since the latter issue turns solely on validity (Pet. No. 389, pp. 11-12). In affirming and enforcing the

2(d) provisions, the court followed the settled judicial practice of affirming and enforcing Commission orders which are valid and which have been violated. There is no basis for inferring, as petitioner does, that the court did anything novel or unusual in this case when, after both the validity of the order and the Commission's findings of violation had been challenged, it rejected those contentions and *"affirmed and enforced"* that part of the order which had been violated.

CONCLUSION

The decision below, insofar as it affirms and enforces paragraphs 4-6 of the Commission's order, is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1955.

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